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No. 93-1995

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

ANR PIPELINE COMPANY, *et al.*,
Petitioners,

v.

DIRECTOR OF PROPERTY VALUATION,
DEPARTMENT OF REVENUE OF THE STATE OF KANSAS,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Kansas

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF OF COMMITTEE ON STATE TAXATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

The Committee on State Taxation ("COST") hereby respectfully requests leave to file a Brief as *Amicus Curiae* in Support of Petitioners. The interest of COST as *amicus curiae* is described *infra* at Brief, p. 1. Despite COST's qualifications to submit an *amicus* brief, Counsel for Respondent has refused to consent to the filing of such a brief. However, in the absence of such permission there are at least two reasons for granting this motion.

First, with respect to the Petition filed in this case, COST has additional observations to make concerning

the Equal Protection implications of the property tax exemption scheme being challenged herein. A full exposition of the controversy and the potential ramifications of this case by each interested and eligible *amicus* is ultimately to the benefit of the Court in its administration of certiorari writs.

Second, MAPCO, Inc., parent corporation of two of the Petitioners, is but one of many member companies of COST that are concerned with the ability of state courts to interpret and administer tax laws in a manner designed to alleviate States' fiscal responsibility for unconstitutional taxing schemes. The recourse to the 4-R Act described herein is but one manifestation of state court practices in this regard; COST has monitored these practices for several years and is uniquely qualified to comment on the scheme in question.

Respectfully submitted,

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Dated: July 13, 1994

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BRIEF OF COMMITTEE ON STATE TAXATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTRODUCTORY STATEMENT

This brief is submitted by the Committee on State Taxation as *amicus curiae* in support of Petitioner in the above-captained matter. Written consent of the Petitioner has been obtained and filed with the Clerk of the Court; the Motion for Leave to File a Brief *Amicus Curiae* is made because the Respondent has refused to likewise grant permission to file a brief.

INTEREST OF *AMICUS CURIAE*

The Committee on State Taxation ("COST") is a non-profit trade association that was organized in 1969 as an advisory committee to the Council of State Chambers of Commerce. COST, which was separately incorporated on January 1, 1992, has a membership of over 420 major multistate corporations, engaged in interstate and international business. COST's objective is to pre-

serve and promote equitable and nondiscriminatory state and local taxation of multijurisdictional business entities. Taxing schemes and tax accommodations of specific taxpayers that effect a discrimination against other taxpayers in the same class, such as occurred in this instance, constitute the exact offenses that COST opposes. Therefore, COST has an interest in this case.

SUMMARY OF ARGUMENT

Kansas is subject to certain restrictions on its otherwise sovereign taxing authority, by virtue of preemptive federal mandates. The federal "4-R" Act requires that the State's property taxation scheme not discriminate against railroads, compared to other "commercial and industrial" property in the State, by reference to either tax rates or assessment ratios. However, the 4-R Act's preemptive scope does not extend to state law property classifications for exemption purposes. Therefore, contrary to the conclusion of the Kansas Supreme Court, the 4-R Act did *not* dictate the result from which Petitioners demur; namely, that the State accord 80% exemptions from taxation of railroad personal property, but tax 100% of the personal property of all other members of the "public utilities" taxation subclass.

The violation of Equal Protection under the Fourteenth Amendment in this case is aggravated by the fact that this Court issued its decision in *Department of Revenue v. ACF Industries, Inc.*, 114 S. Ct. 843 (1994), which established the above-noted limitations on 4-R Act preemption of State law, three days after the Kansas Court's decision in this case—but the Kansas Court chose to ignore the dictates of this Court by denying the Petitioners' Motion for Rehearing in light of *ACF Industries*. The enforcement of this Court's pronouncements of law should not be left to the whims of state courts. Those pronouncements should serve as iron-clad principles guiding both state courts' considerations and reconsiderations of constitutional questions such as those presented in this case.

ARGUMENT

Kansas law places railroads and other "public utilities," including pipelines, in the same subclass for property tax purposes. Kansas Const., art. 11, § 1(b); K.S.A. 79-5a01. Among their allegations, ANR and the other Petitioners claim that they have suffered discriminatory tax treatment in violation of the Equal Protection Clause by virtue of the fact that certain railroads received nonstatutory 80% exemptions of personal property from property taxation. In contrast, 100% of the property of the Petitioners was subject to property taxation.

The Kansas Supreme Court recognized that the exemptions accorded to certain railroads by the Director of Property Valuation fell outside the bounds of the Kansas property tax statutes and interpretive regulations, and recognized that this was the result of the settlement of claims the favored railroads made under the federal "4-R" Act. *See* Pet. Br. App. 8a; *see also* Railroad Revitalization & Regulatory Reform Act of 1976, Pub. L. 94-210, 90 Stat. 31, 54-5 [codified at 49 U.S.C. § 11503 (1988)]. Moreover, the State Court acknowledged that it was "at a loss from the record to see the basis for this exemption," Pet. Br. App. 8a. Nevertheless, it concluded that the equal treatment of certain railroads and of the Petitioner pipelines was not violative of the Equal Protection Clause of the Constitution. It did so because it found that the 4-R Act preempted state law property classifications:

> The 4-R Act, as it applies to Kansas and as reflected in the consent decree, simply required that railroad property be assessed at no higher rate than commercial or industrial property. Railroad property was thereby made an exception to subclasses to which public utility property was assigned.

Pet. Br. App. 12a.

Some of the preferential treatment of railroad property is dictated by the federal government under the 4-R Act. To the extent that a State has applied either an assessment ratio or tax rate to railroad property that is discriminatory, relative to the ratios or rates applied to any other commercial or industrial property located in the State—by reference to the most favorable treatment accorded to commercial or industrial property, whether or not that property is classified or subclassified with railroad property for state tax purposes—such discriminatory treatment is preempted by the 4-R Act. However, the State Court's conclusion that the 4-R Act completely preempts state law and mandates an exemption of 80% of railroad property from any taxation at all is clearly repudiated by this Court's decision in *Department of Revenue v. ACF Industries, Inc.*, 114 S. Ct. 843 (1994).

This Court stated in *ACF Industries* that the 4-R Act is structured and drafted to address the manner in which "property subject to a tax levy" is taxed, and that the Act therefore "does not limit state discretion to levy a tax upon railroad property while exempting various classes of nonrailroad property." *ACF Industries*, 114 S. Ct. at 850. In other words, while Congress "prohibited discriminatory tax rates and assessment ratios in no uncertain terms . . . and sets forth precise standards for judicial scrutiny of challenged rate and assessment practices," *ibid.*, the Act does not make railroad property an exception to any state law classification for exemption purposes. Furthermore,

> Principles of federalism support, in fact compel, our view. Subsection (b)(4), like the whole of § 11503, sets limits upon the taxation authority of state government, an authority we have recognized as central to state sovereignty. . . . When determining the breadth of a federal statute that impinges upon or pre-empts the States' traditional powers, we are hesitant to extend the statute beyond its evi-

> dent scope. . . . We will interpret a statute to pre-empt the traditional state powers only if that result is "the clear and manifest purpose of Congress." . . . As explained above, neither subsection (b)(4) nor the whole of § 11503 meet this standard with regard to the prohibition of property tax exemptions.

Id. at 850-851 (citations omitted).

The Kansas Supreme Court's decision in this case was issued on January 21, 1994; *ACF Industries* was issued on January 24, 1994. Petitioners immediately moved the Kansas Supreme Court for a rehearing of its case in light of this Court's enunciation of the principles of federal preemption of state property taxation of railroads. Nevertheless, in complete disregard of this Court's ultimate authority to speak to the issue of preemption, the State Court denied, without comment, the Petitioners' Motion for Rehearing on March 15, 1994.

The Petitioners deserve to have their claims reviewed under the proper constitutional standard—the Equal Protection Clause of the Fourteenth Amendment—and by reference to the appropriate line of authority. *See, e.g., Sioux City Bridge Co. v. Dakota County*, 260 U.S. 441 (1923); *Allegheny Pittsburgh Coal Co. v. County Comm'n*, 488 U.S. 336 (1989). The guaranty of equal protection "protects the individual from state action which selects him out for discriminatory treatment by subjecting him to taxes not imposed on others of the same class." *Hillsborough v. Cromwell*, 326 U.S. 620, 623 (1946). The above-cited cases enunciate the test for whether a violation of the Equal Protection Clause has occurred, *i.e.*, whether an "intentional systematic undervaluation by state officials of other taxable property in the same class contravenes the constitutional right of one taxed upon the full value of his property." *Sunday Lake Iron Co. v. Township of Wakefield*, 247 U.S. 350, 352-353 (1918); *Sioux City, supra* at 445-446.

The Petitioners in this case were accorded the tax treatment provided for by Kansas law; however, other members of their class were unfairly accorded better treatment. The Kansas Director's intentional and systematic exemption of large portions of property of one specific subset of taxpayers (the railroads in question) constitutes an undervaluation of select property in the public utility subclass to the constitutional detriment of all other members of that subclass whose property is not exempt. In this regard, it is inadequate to relegate the Petitioners here to a remedy of seeking equal inclusion in the tax base and taxation of railroad property; as this Court clearly recognized in *Allegheny Pittsburgh,* a remedy is unavailable to the petitioners in such cases as a practical matter absent court action:

> "The [Equal Protection Clause] is not satisfied if a State does not itself remove the discrimination, but imposes on him against whom the discrimination has been directed the burden of seeking an upward revision of the taxes of other members of the class."

488 U.S. at 346 (quoting *Hillsborough,* 326 U.S. at 623).

If this Court does not grant a writ of certiorari in this case, then the case should at the very least be remanded for reconsideration in light of *ACF Industries,* and—if the Kansas Supreme Court does not reverse itself—for a statement of the basis upon which discrimination is justified.

CONCLUSION

For the reasons set forth above, the Committee On Taxation respectfully requests that the Court grant a writ of certiorari in this case, or, in the alternative, remand the case for a statement of the basis upon which discrimination is justified.

Respectfully submitted,

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